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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1065

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS

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The Respondents, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company, file this Brief in opposition to Petition of Joseph A. Maloney, d/b/a The Apalachicola Times, seeking Writ of Certiorari to the Supreme Court of Florida and the District Court of Appeal of Florida, First District, to review the opinion of the District Court of Appeal entered in this cause on June 13, 1972.

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §1257 (3) and Rule 19(1)(a), Supreme Court Rules. Respond-

ents submit that the decision of the District Court of Appeal of Florida clearly does not decide a federal question of substance in a way not in accord with applicable decisions of this Court, therefore this Court should decline jurisdiction at the outset.

QUESTIONS PRESENTED

Respondents do not agree that the questions presented in the Petition are properly before this Court. Respondents further submit that the two questions presented by Petitioner should be answered as follows:

ONE:

The opinion of the District Court of Appeal of Florida does not decide a substantial federal question in a way not in accord with prior decisions of this Court.

TWO:

The opinion of the District Court of Appeal of Florida does not misinterpret and misapply the decisions of this Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), so as to deny Petitioner's right to jury trial.

REASONS FOR DENYING THE WRIT

The District Court of Appeal of Florida correctly interpreted and applied the opinions of this Court, partic-

ularly *New York Times v. Sullivan*, supra, and *Rosenbloom v. Metromedia, Inc.*, supra, in holding that Respondent's actions were constitutionally privileged under the First Amendment right of free speech.

In *Curtis Publishing Co. v. Butts, Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975 (1967), this Court expanded the class of persons coming within the "public official" doctrine of *New York Times v. Sullivan* to include a "public figure" who has been "involved in issues in which the public has a justified and important interest". *Id.* at 134, 87 S.Ct. at 1980. *Rosenbloom v. Metromedia, Inc.* further expanded this class to include a private individual whose involvement in an event of public or general interest has been the subject of defamation. Under this line of decisions, false publications are privileged, absent proof of "actual malice", in the interest of the dominant principle that "debate on *public issues* should be uninhibited, robust, and wide-open." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 43, 91 S.Ct. at 1819. This Court has clearly defined "actual malice" as existing only when a statement is made with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-280, 84 S.Ct. at 726.

On examination of the record of the first trial, the Supreme Court of Florida held that Petitioner was indeed a "public figure" by virtue of his own editorial actions which made him "a part of the passing scene and therefore subject to fair comment." *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla. 1970). The Court further

expressly found that the issue of community economic growth with which Petitioner had become identified by his own editorial actions was a proper subject for public interest. *Id.* at 826. As result of these findings, Petitioner himself clearly falls not only within the scope of the "public figure" privilege enunciated by *Butts*, but Petitioner's actions fall within the "public events" expansion of *Rosenbloom*.

Following the law of the case enunciated by the Supreme Court of Florida that Petitioner was indeed a public figure involved in events of public interest, the District Court of Appeal examined the record of retrial and found that the jury had not been limited to finding Respondents liable only if malice were deemed proved. The District Court of Appeal made an independent examination of the trial record for evidence of malice which might support the jury's verdict in favor of Petitioner but concluded:

> "We cannot find, based on our independent analysis of the record, that the proofs considered either singularly or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statement about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not." *Gibson v. Maloney*, 263 So.2d 632, 637 (1st D.C.A. Fla. 1972).

In considering the requisite element of malice, the District Court of Appeal continued to act in accordance with the decisions of this Court when it examined the sufficiency of the evidence before the jury. This Court imposes this duty of de novo review.

> "Aside from these particularized considerations, we have repeatedly recognized that courts may not avoid an excursion into fact-finding in this area simply because it is time consuming or difficult. We stated in Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946), that:
>
> 'The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which requires interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they *** are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'
>
> Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.' Jacobellis v. Ohio, 378

> U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2nd 793 (1964). The simple fact is that First Amendment questions of 'constitution fact' compel this Court's de novo review." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 53-54, 91 S.Ct. at 1824-1825.

The District Court of Appeal was therefore required to reverse the jury verdict when its examination disclosed insufficient evidence to support the finding of malice essential to any liability of Respondents. To have done otherwise would have grossly denied Respondents the protection of the First Amendment.

Petitioner has sought in the Petition to remove the instant case from the scope of privilege by reliance upon examples of defamation within a private group or "trade libel". In the case emphasized by Petitioner, the federal court of appeals found the dissemination of *specialized* financial information to subscribers was not within the area of public interest which is the underlying justification for the privilege. *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. den. ____ U.S. ____, 92 S.Ct. 1289 (1972). The instant case concerns defamations which clearly fall within the scope of general public interest and were thus so expressly found by the Florida Supreme Court. *Gibson v. Maloney*, 231 So.2d 823, 826 (Fla. 1970). Nor was the audience in the present case a closed group whose distinguishing feature is a private business interest as in the case cited by Petitioner. In fact, the Florida Supreme Court took judicial notice of the public nature of Rotary Clubs. *Id.* Fur-

thermore, printed copies of Respondents' speech were mailed to the general subscribers of Respondents' telephone service in an effort to achieve greater publication.

The proceedings of the Florida courts conclusively reveal that those courts clearly considered the policies underlying the decisions of this Court in *New York Times v. Sullivan* and its progeny and meticulously applied those decisions to the present case.

Petitioner's claim under the Seventh Amendment's guarantee of jury trial has no basis in law and therefore is not properly before this Court. The Seventh Amendment's provision for jury trial has not been incorporated by the Fourteenth Amendment.

> "A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." *Olesen v. Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir. 1957), cert. den. 355 U.S. 896, 78 S.Ct. 70 (1957).

CONCLUSION

The Court should decline to issue the Writ of Certiorari in this case on jurisdictional grounds. Prior decisions of this Court have been correctly interpreted and applied in this case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, CHARLES S. ISLER, JR., a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner by mailing copy thereof in duly addressed envelope to J. Ben Watkins of Watkins & Hill, P. O. Drawer 1814, Tallahassee, Florida 32302, Attorneys for Petitioner, this ____ day of February, 1973.

Charles S. Isler, Jr.